

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
The Rural Digital Opportunity Fund Auction)
(Auction 904)) AU Docket No. 20-34
Rural Digital Opportunity Fund)
WC Docket No. 19-126

ORDER ON RECONSIDERATION

Adopted: May 23, 2023

Released: May 23, 2023

By the Chief, Wireline Competition Bureau:

1. In this Order, the Wireline Competition Bureau (Bureau), in conjunction with the Office of Economics and Analytics (OEA), denies a petition for reconsideration submitted by Etheric Communications LLC (Etheric) of the Bureau’s decision to dismiss as moot and alternatively deny Etheric’s request for waiver of the eligible telecommunications carrier (ETC) designation documentation deadline.2 We affirm the Bureau’s decision.

I. BACKGROUND

2. In the Rural Digital Opportunity Fund Order, the Commission determined that long-form applicants were required to obtain ETC designations covering each of the geographic areas for which they sought to be authorized for support and established a deadline of June 7, 2021 for submitting the relevant documentation.3 The Commission recognized that, in some cases, applicants may face delays in obtaining their ETC designations and explained that a long-form applicant could seek waiver of the ETC deadline if it anticipated that it would not be able to obtain the required designations within 180 days.4 Additionally, the Commission noted that it would presume that a long-form applicant acted in good faith if it filed its ETC application with the relevant state authority within 30 days of the release of the public notice identifying Rural Digital Opportunity Fund auction (RDOF or Auction 904) winning bidders.5

1 See Etheric Communications LLC, Petition for Reconsideration, AU Docket No. 20-34 et al. (filed Feb. 13, 2023) (Etheric Petition for Reconsideration).

2 Rural Digital Opportunity Fund Support Authorized for 1,764 Winning Bids; Etheric Communications LLC’s Petition for Waiver of the June 7, 2021 Eligible Telecommunications Carrier Documentation Deadline Denied, AU Docket No. 20-34 et al., Public Notice, DA 23-33 at 1-2 & n.1 (WCB Jan. 13, 2023) (Etheric Dismissal and Denial Public Notice).

3 Connect America Fund, Report and Order, WC Docket No. 19-126 et al., 35 FCC Rcd 686, 727-28, para. 92. (2020) (Rural Digital Opportunity Fund Order); see also Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced, FCC Form 683 Due January 29, 2021, Public Notice, 35 FCC Rcd 13888, 13894, para. 17 (2020) (Auction 904 Closing PN).

4 See Rural Digital Opportunity Fund Order, 35 FCC Rcd at 723, para. 81 n.230.

5 Id. at 723, para. 81. As this public notice was released on December 7, 2020, applicants had until January 6, 2021 to avail themselves of this “good faith” presumption. See Auction 904 Closing PN.

3. *ETC Waiver Dismissal and Denial.* Etheric sought relief of the deadline for providing documentation of its ETC designation in the state of California after filing its ETC designation petition with the California Public Utilities Commission (CPUC) on January 5, 2021, within the 30-day “good faith presumption” window.⁶ On December 16, 2022, the CPUC issued a decision denying Etheric’s request for an ETC designation covering its Auction 904 winning bids in the state.⁷ Etheric then notified the Commission that it was “considering its options to respond to the CPUC Decision and further proceedings to obtain ETC status in California” and urged the Commission “to defer final action on its pending long form application until any further proceeding it pursues to obtain ETC status for California have been completed.”⁸ Because the CPUC had denied Etheric’s petition for ETC designation, the Bureau dismissed Etheric’s petition for waiver as moot on January 13, 2023.⁹ Alternatively, the Bureau also denied Etheric’s petition for waiver on the merits, finding “that it would not serve the public interest to delay action on Etheric’s Rural Digital Opportunity Fund application indefinitely after the CPUC has already denied Etheric’s ETC petition and while Etheric considers its options for moving forward.”¹⁰

4. *Request for Reconsideration.* Etheric submitted a petition for reconsideration of the Bureau’s dismissal and/or denial of its waiver request.¹¹ Etheric argues that the Bureau “acted prematurely” on Etheric’s request for waiver because it had “not exhausted California administrative remedies to reverse” the CPUC’s denial.¹² Etheric also claims the Bureau erred by “fail[ing] to assess the CPUC Order denying Etheric ETC status on its legal merits,” and asserts that the CPUC’s denial is “highly vulnerable to reversal upon further review.”¹³ Additionally, Etheric argues that the CPUC, in denying the ETC petition, “establish[ed] their own unique eligibility and compliance criteria for universal service funding,” and that “the Commission’s rules provide no authority for a state agency unilaterally to preclude a provisional support recipient’s performance of its RDOF obligations based on *sui generis* review of the financial criteria set out in the [Federal Communications Commission’s] rules.”¹⁴ Finally,

⁶ Application of Etheric Communications, LLC for a Certificate of Convenience and Necessity to Provide Full Facilities-Based and Resold Competitive Local Exchange and Non-Dominant Interexchange Service and Designation as an Eligible Telecommunications Carrier in California, Application 21-01-002 (filed Jan. 5, 2021); Etheric Communications, LLC Petition for Waiver of Section 54.804(b)(3) of the Commission’s Rules, AU Docket No. 20-34 et al., at 3 (filed May 12, 2021) (Etheric ETC Waiver Petition). We note that despite Etheric’s reference to section 54.804(b)(3) of the Commission’s rules (letter of credit commitment letter) in its request, Etheric acknowledged in its Petition for Reconsideration that the caption should be corrected to seek waiver of section 54.804(b)(5) regarding the ETC designation deadline. Etheric Petition for Reconsideration at 1.n.4.

⁷ California Public Utilities Commission, Application of Etheric Communications, LLC for a Certificate of Public Convenience and Necessity to Provide Full Facilities-Based and Resold Competitive Local Exchange and Non-Dominant Interexchange Service and Designation as an Eligible Telecommunications Carrier in California, Application 21-01-002, Decision Granting Etheric a Certificate of Public Convenience and Necessity in Order to Provide Full Facilities-Based and Resold Competitive Local Exchange Services and Resold Interexchange Services but Denying Designation as an Eligible Telecommunications Carrier, Decision 22-12-026 (Dec. 15, 2022) (*CPUC Denial Order*).

⁸ See Letter from Stephen E. Coran, Counsel to Etheric Communications LLC, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 20-34 et al. (filed Dec. 21, 2022) (Etheric Dec. 21, 2022 *Ex Parte*).

⁹ *Etheric Dismissal and Denial Public Notice* at 1 n.1.

¹⁰ *Id.* at 1-2 n.1 (explaining that “[b]y denying Etheric’s petition, [the Bureau] open[s] the relevant areas covered by Etheric’s Auction 904 winning bids up to eligibility for future funding programs to the extent they remain unserved, rather than tying up these areas for an indefinite period of time with no indication that Etheric will ultimately obtain an ETC designation from California”).

¹¹ See generally Etheric Petition for Reconsideration.

¹² *Id.* at 3.

¹³ *Id.* at 4-8.

¹⁴ *Id.* at 8-9.

Etheric claims that “the resolution of Etheric’s California ETC application provides a faster path for unserved areas” to become served than waiting for future funding programs, and that “a final decision on the pending RDOF application can be rendered well in advance of any need to finalize eligibility for such future support programs.”¹⁵

II. DISCUSSION

5. Generally, the Commission’s rules may be waived for good cause shown.¹⁶ Waiver of the Commission’s rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.¹⁷ Further, the Commission may reconsider the record and change its decision if the facts in the record demonstrate a waiver is warranted and in the public interest.¹⁸ However, a petition for reconsideration that relies on facts or arguments not previously presented may only be granted in certain circumstances.¹⁹ As explained below, upon reconsideration, we affirm our previous decision and deny the petition for reconsideration filed by Etheric.

6. We reject Etheric’s claim that the Bureau erroneously concluded that Etheric has been “unable” to obtain its ETC designation and should have waited until Etheric exhausted its administrative remedies prior to acting on Etheric’s petition for waiver.²⁰ The Communications Act of 1934, as amended, gives state commissions the primary responsibility for granting ETC designation to companies operating in their states.²¹ As Etheric notes, “Congress intended that state regulators could ‘evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity,’” consistent with federal and other state law.²² After lengthy and apparently thorough consideration, including several supplemental requests to and responses from Etheric, the CPUC on December 16, 2022, issued a decision denying Etheric’s petition to obtain an ETC designation.²³ While Etheric has sought rehearing, the CPUC’s decision is final and has not been stayed by the CPUC or a court.²⁴ The Bureau is required to heed the CPUC’s decision and thus reasonably determined that Etheric is unable to obtain an ETC designation, and therefore Etheric’s waiver petition is moot.

¹⁵ *Id.* at 9-10.

¹⁶ 47 CFR § 1.3.

¹⁷ *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972)).

¹⁸ *See* 47 CFR § 1.106(c)(2).

¹⁹ 47 CFR § 1.106 (b)(2), (c) (these include that “[t]he petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;” “[t]he petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;” or “[t]he Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest”).

²⁰ Etheric Petition for Reconsideration at 3.

²¹ 47 U.S.C. § 214(e).

²² Etheric Petition for Reconsideration at 5 (quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6397-98, para. 61 (2005) (citation omitted)).

²³ CPUC Denial Order at 2-4, 20-28, 30.

²⁴ *See* 20 Cal. Code. Regs. § 16.1(b) (“Filing of an application for rehearing shall not excuse compliance with an order or a decision.”). The decision of the CPUC was effective upon release. CPUC Denial Order at 42.

7. We also are not persuaded that we should have assessed the legal merits of the CPUC's decision to deny Etheric's designation before dismissing and/or denying Etheric's waiver petition.²⁵ The Commission lacks jurisdiction to review a state's decision to grant or deny an ETC application.²⁶ Further, we note that the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC* held that nothing in section 214(e)(2) prohibits states from imposing their own eligibility requirements on carriers seeking ETC designations.²⁷ Thus, it appears that the CPUC is within its authority to consider, with respect to applications for ETC designations to receive RDOF support, "the local circumstances particular to each application," including "the ability of each applicant to carry out the RDOF build with its existing financial, technical, and operational expertise," consistent with the Commission's RDOF rules.²⁸ While the state's authority over ETC designations effectively may act "as a barrier to [the Commission's] own decisionmaking"²⁹ where states determine, consistent with the Commission's rules, that granting an application for ETC designation may not be in the public interest, this cooperative federalism was intended by Congress.³⁰

8. Finally, we uphold the Bureau's determination that Etheric's waiver petition should be denied on the alternative and independent grounds that it would not serve the public interest to delay action on Etheric's long-form application indefinitely while Etheric considered and pursued an appeal of the CPUC's decision.³¹ At the federal level alone, there are a number of programs that currently or soon

²⁵ Etheric Petition for Reconsideration at 4-9. As a threshold matter, these are new arguments that were not raised on the record prior to the Bureau making its decision, which precludes us from granting the petition on these grounds absent the circumstances specified in section 1.106 of the Commission's rules. 47 CFR § 1.106(c). Although Etheric notified the Commission it was pursuing its options "to respond" to the CPUC's decision, Etheric did not supplement its petition for waiver, nor did it raise the arguments on the record about the claimed deficiencies in the CPUC's decision that Etheric now makes in its petition for reconsideration. Etheric Dec. 21, 2022 *Ex Parte* at 1. Etheric does not claim that these arguments "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission" or that these arguments were "unknown" to Etheric "until after [its] last opportunity to present them to the Commission". 47 CFR § 1.106(b)(2), (c)(1). Because the Bureau released its decision almost a month after the CPUC denied Etheric's ETC petition, Etheric had ample time to supplement its waiver petition to include such arguments. See *Etheric Dismissal and Denial Public Notice*, at 1-2 & n.1; *CPUC Denial Order*. And for the reasons described herein, we are not persuaded that it would serve the public interest to consider these arguments. 47 CFR § 1.106(c)(2).

²⁶ See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Red 6371, 6374, 6379, paras. 8, 19 (2005) (explaining that the Commission "encourage[d]" rather than required state commissions to adopt the same conditions and analysis that the Commission adopted for its own ETC designation process, while also noting that "[s]ection 214(e)(2) of the Act provides state commissions with the primary responsibility for performing ETC designations."). Of course, the Commission may preempt a state decision that unlawfully trenches on FCC authority. But Etheric has not requested preemption, and in any event preemption is not warranted here, where (as explained below) the CPUC acted within its authority consistent with section 214(e) and the Fifth Circuit's holding in *Texas Office of Public Utility Counsel et al. v. Federal Communications Commission*, 183 F.3d 393, 418 (5th Cir. 1999).

²⁷ *Texas Office of Public Utility Counsel et al.*, 183 F.3d at 418.

²⁸ CPUC Denial Order at 28.

²⁹ Etheric Petition for Reconsideration at 8-9.

³⁰ See *Rural Digital Opportunity Fund Order*, 35 FCC Red at 727-28, para. 92 (adopting the same ETC requirements for RDOF that the Commission adopted for the Connect America Fund Phase II auction and stating "[w]e recognize the statutory role that Congress created for state commissions and the FCC with respect to ETC designations, and we do not disturb that framework").

³¹ Absent further action by the CPUC, Etheric may assume the CPUC has denied its application for rehearing within 60 days of filing and challenge the CPUC's decision in court. Cal. Pub. Util. Code §§ 1733, 1756.

will offer broadband funding for service providers.³² The Commission must coordinate its broadband funding programs with those administered by other federal agencies to prevent or limit overlap and duplication among the various programs in order to maximize the efficient use of such funds.³³ If the status of the areas covered by Etheric’s winning bids remains pending, other funding programs may not provide support in these areas, potentially leaving the consumers stranded in these areas without service if Etheric is not ultimately authorized for RDOF support. The Bureau’s decision made clear that no RDOF support will be spent in the areas covered by Etheric’s winning bids and, in doing so, reduces the risk that funding will be used inefficiently. Etheric provides no support for its claims that “a final decision on the pending RDOF application can be rendered well in advance of any need to finalize eligibility for . . . future support programs,” and that the areas covered by its winning bids would be served “faster” if Etheric is able to exhaust its administrative remedies in California than if the areas became eligible for a different funding program.³⁴ We are not persuaded by these speculative assertions.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 214, 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 214, 254, 405, and sections 0.91, 0.271, 0.291, 1.106 and 1.3 of the Commission’s rules, 47 CFR §§ 0.91, 0.271, 0.291, 1.106, 1.3, that this Order IS ADOPTED.

10. IT IS FURTHER ORDERED that the petition for reconsideration of the deadline for providing documentation of ETC designation for Auction 904 filed by Etheric Communications LLC IS DENIED as described herein.

11. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission’s rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Wireline Competition Bureau

³² See, e.g., United States Department of Agriculture, ReConnect Loan and Grant Program, <https://www.usda.gov/reconnect> (last visited May 23, 2023); National Telecommunications and Information Administration, Broadband Equity, Access, and Deployment Program, Notice of Funding Opportunity, <https://broadbandusa.ntia.doc.gov/broadband-equity-access-and-deployment-bead-program> (last visited May 23, 2023) (BEAD NOFO); U.S. Department of the Treasury, Capital Projects Fund, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/capital-projects-fund> (last visited May 23, 2023); Department of Treasury, Coronavirus State and Local Fiscal Recovery Funds, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds> (last visited May 23, 2023).

³³ See Press Release, FCC et al., FCC, NTIA, USDA and Treasury Announce Interagency Agreement to Collaborate on Federal Broadband Funding (May 12, 2022), <https://www.fcc.gov/document/fcc-ntia-usda-treasury-announce-broadband-info-sharing-agreement>.

³⁴ Etheric Petition for Reconsideration at 9-10.